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Supreme Court of the United States

OCTOBER TERM, 1931

No. 503

JACK HARDEMAN, *Petitioner*

VERSUS

ALBERT T. WITBECK, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

The decision under review is reported in *51 Fed. (2d) 450.*

On May 6, 1925, an oil and gas prospecting permit was issued to Witbeck by the Secretary of the Interior (R. 123) under the provisions of the Act of Congress approved February 25, 1920 (*41 Stat. 437 et seq.; U. S. Code, Title 30, § 181 et. seq.*). Hardeman, on May 27, 1925, filed his bill in the District Court, alleging that the action of the Secretary in issuing the permit to Witbeck wrongfully ignored prior and superior rights of the plain-

tiff under the leasing statute, praying that he be decreed the equitable owner thereof, and that Witbeck be charged as a trustee for the plaintiff's benefit and ordered to assign the permit to the plaintiff.

ARGUMENT

I.

AS TO JURISDICTION

Title to the land admittedly is in the United States. The very foundation of plaintiff's case is this premise. Witbeck was granted a permit by the Secretary of the Interior. The statute does not *require* the Secretary in any case to grant such permit; it merely *authorizes* (Sec. 13) such contracts to be made by the Secretary, "under such necessary and proper rules and regulations as he may prescribe" (*U. S. Code, Title 30, §221*). The permit involves contractural relations between the permittee and the United States,[1] and, necessarily, the deliberate action of Congress in vesting discretionary power in the Secretary in the matter of the selection of the permittee must be given due weight. Furthermore, the statute (Sec. 30) distinctly prohibits an assignment or subletting without the consent of the Secretary. The issuance of a permit, therefore, in no manner operates the disposition of the Government's title; there is simply a contract entered into, pursuant to the statute and the regulations of the Department, between the Secretary of the Interior and the individual permittee, under which the latter secures rights to operate government-owned land.

[1] Besides the other provisions of the permit, Witbeck was under obligation to furnish bond (R. 128), and did procure and furnish same (R. 130) with surety satisfactory to the Department.

It should be sufficient to dispose of the question of jurisdiction that title to the land and the minerals is in the United States.

It was long ago settled by this Court that "after the United States has parted with its title and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before."

Marquez vs. Frisbie, 101 U. S. 473;
Bockfinger vs. Foster, 190 U. S. 116;
Humbird vs. Avery, 195 U. S. 480;
Oregon vs. Hitchcock, 202 U. S. 60.

For it will be borne in mind that we are not dealing with a mere possessory right; the litigation is with respect to the superior right of one or the other of the parties to take oil and gas from land which it is conceded is owned by the United States. The suit affects rights in, nor merely to, lands belonging to the Federal Government, and such rights are not justiciable without its consent.

This question is fully discussed in the concurring opinion of Judge Hutcheson in this case. See *51 Fed. (2) 454.*

As pointed out by Judge Hutcheson, it is not necessary to discuss whether the settled Federal decisions referred to in the majority opinion are correct which permit litigation by parties holding under the permittee or lessee of the United States. Certain it is that under the jurisprudence such action cannot be maintained by one claiming adversely to the permittee.

Besides, the object of this suit is to substitute for the permittee selected by the Secretary a person whom the Secretary has heretofore rejected; and thereby to thrust

into a contract made by the duly authorized administrator of Government lands another contracting party with whom the Secretary had refused to deal. In other words, the purpose of this suit is to compel the United States to enter into an oil development contract with a person with whom the Secretary of the Interior has refused to contract, and to deprive the United States of the contractual obligation of the person with whom the Secretary, as the administrator of the public domain, has contracted. A mere statement of the issue demonstrates that the United States is an indispensable party to this proceeding. In such case, of course, the courts have no jurisdiction, unless the United States enter a voluntary appearance.

Louisiana vs. Garfield, 211 U. S. 70;
New Mexico vs. Lane, 243 U. S. 52, 58;
Morrison vs. Work, 266 U. S. 481, 485;
See also *Oregon vs. Hitchcock, 202 U. S. 60;*
Naganab vs. Hitchcock, 202 U. S. 473.

II.

THE BILL STATES NO CAUSE OF ACTION.

It is the established rule not only that a bill to impress a trust because of proceedings in the Interior Department will not lie until complete legal title has left the United States, but also that in no case can the plaintiff recover merely by showing that the defendant was not entitled to patent. It is incumbent upon the plaintiff to show a clear legal right in himself.

In *Bohall vs. Dilla, 114 U. S. 47*, the Court said:

"To charge the holder of the legal title to land under a patent of the United States, as a trustee of another and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by law properly administered the title should have been awarded to the claimant."

See also

Lee vs. Johnson, 116 U. S. 48;
Bodley vs. Taylor, 5 Cranch 191;
Sparks vs. Pierce, 115 U. S. 408;
Fisher vs. Rule, 248 U. S. 314.

The only portion of plaintiff's bill, therefore, to be considered by the Court in determining whether it states a cause of action is that part which is relied upon as showing that plaintiff, as a matter of law, was entitled as of right to the permit.

But the statute vests no such *right* in any one.

As heretofore pointed out, the act merely *authorizes* the Secretary, "under such necessary and proper rules and regulations as he may prescribe," to grant a permit. The statute entirely lacks any mandatory direction. It confers *authority* upon the Secretary, not a duty, and that authority is to be exercised under rules and regulations prescribed by the Secretary himself. Section 32 of the act, *U. S. Code, Title 30, § 189,* again vests authority in the Secretary.

> "to prescribe necessary and proper rules and regulations, and to do any and all things necessary to carry out and accomplish the purposes of this Act."

Acting under this delegation of power, the Secretary promulgated the rules and regulations (*47 L. D. 437 et seq.*) Under the heading *"1. Oil and Gas Permit," subsection 2, 47 L. D. 438,* the regulations state:

> "It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant."

Since the condition necessary to the maintenance of the bill, to wit, the showing of a *legal right* in the plaintiff, cannot be made in view of the statute and the regulations, it follows that the bill discloses no cause of action, regardless of what mistakes might have been made or what wrongs might have been done in the course of the administrative proceedings referred to in the bill.

Anicker vs. Gunsburg, 246 U. S. 110.

It matters not whether, under the facts stated in the bill, the Secretary erred, or whether Witbeck was or was not entitled to the permit. Plaintiff's case must depend upon a showing that he, *Hardeman, was entitled as of right* to the contract. This he cannot do in view of the fact that the statute and the regulations preclude the acquisition by any one of a legal *right* to a permit in any case.

In *United States ex rel. McLennan vs. Wilbur, 283 U. S. 414, 419,* it was held that such right did not exist: the contention of the Secretary being sustained

> ". . . that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant."

Besides, since the purpose of the bill is to compel the substitution of Hardeman for Witbeck and the assignment by Witbeck to Hardeman, the bill discloses no cause of action, because of the provision in the leasing statute[1] forbidding such assignment without the consent of the Secretary of the Interior, and of the provision in the regulations[2] requiring the consent of the Secretary to the assignment of any permit.

III.

ON THE MERITS

On November 12, 1923 (R. 83), Witbeck filed an application conforming in all respects to the rules and regulations of the Department for an oil and gas permit under Section 13 of the leasing act. This application was sworn to on November 9th, and was accompanied by payment of the fees required by the regulations of the Department.

The plaintiff, Hardeman, filed his application for a permit on December 11, 1923 (R. 80), 29 days after

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[1] See *section 30 (41 Stat. 449; U. S. Code, Title 30, sec. 187).*

[2] "Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior."
47 L. D. 446.

Witbeck's application had been officially marked filed. Hardeman, however, claimed a preference right because of an unsworn statement made in his application that he had located the land and staked it off in the manner prescribed by the rules on November 11, 1923. The regulations of the Secretary of the Interior, found in *Volume 47 of the Land Decisions, page 437 et seq.*, prescribe the requisites to an application for a permit under the statute. Hardeman's application failed to comply with these regulations in a number of respects; it was accompanied by no jurat as required by the rules, failed to give the three references as to the applicant's reputation and business standing as the rules required, and was not accompanied by payment or tender of any fees, and indeed the notice posted misdescribed the land. The preference right for which Hardeman contended is covered on page 441 of the regulations published in *Volume 47 of the Land Decisions*. Both statute and regulations emphasize the fact that such right is merely one to be preferred over other applicants and which does not confer a legal right against the United States.

The regulations include the standing rules approved August 9, 1918, and contained in Circular 616 (*46 L. D. 513*); paragraph 8 of which provides peremptorily that:

> "Where no money is tendered, the application . . . will be rejected."

Not only does the evidence show, but it is admitted in the bill (R. 4), that Hardeman did not tender the fees with his application. Indeed, it was not until December 19, 1923 (R. 107), long after the expiration of thirty days from the alleged location and taking of possession, that Hardeman did tender the required fees. Moreover, that

Hardeman never made oath to his application was judicially admitted by him in the bill which he filed in the Supreme Court of the District of Columbia (R. 31; R. 57):

> "Said application was executed over the signature of the plaintiff, but was not sworn to by him." (R. 31).

This, then, was the situation: Witbeck applied for the permit on November 12th. Hardeman applied on December 11th. Witbeck's application was in the form and accompanied by the incidents prescribed by the regulations. Hardeman's application lacked the affidavit, lacked the reference, with notice posted misdescribing the land, and was non-receivable because not accompanied by tender of the fees. Hardeman claimed under the regulations a preference right for thirty days from November 11th. Such preference right is only "over others," not against the Government, and is for thirty days only. It was necessary, in order to maintain his asserted preference, that his application should have been properly filed before December 12th. This was not done, and the standing regulations of the Department required the rejection of the application without further ceremony because no fees were tendered. If the local officers had done their duty, they would have refused to file Hardeman's application and would have sent Witbeck's to Washington unopposed for approval.

Contest between Hardeman and Witbeck then resulted. From an adverse decision of the Commissioner of the General Land Office Witbeck appealed to the Secretary of the Interior (R. 85), who, on April 15, 1924, affirmed the decision of the Commissioner (R. 85-90). See *50 L. D. 413.* Protests were then filed by Witbeck with the

Secretary of the Interior, making serious charges against the Hardeman application (R. 91 et seq.), which resulted in the matter being held up in the Interior Department. On November 28, 1924, Witbeck's Washington attorneys entered their appearance (R. 103), requesting that, upon the coming in of the report of the field agent, they be afforded opportunity to examine the record and that action be withheld by the Secretary pending their examination. On January 3, 1925, counsel for Witbeck filed with the Secretary a petition invoking his supervisory power (R. 106), and asking for a readjudication of the matter and a vacation of the decision of April 16, 1924. The Secretary, on examination of the record and from information furnished him by the land office at Baton Rouge, concluded (R. 108) that Hardeman's failure to tender concurrently with his application the fees required by law rendered his application null; that he had not, therefore, filed a legal application within the thirty days during which he might have had a preference; and that Witbeck's application, having been filed in proper form and accompanied by the requisite fees, should be given effect. The Secretary therefore ordered (see *51 L. D. 36*) that the decision of April 16, 1924, be vacated to the extent that it recognized a preference right upon the part of Hardeman, and reversed the decision of the Commissioner of the General Land Office (R. 110). This decision of the Secretary was made on January 12, 1925. Thereafter (R. 110) Hardeman filed a motion for a rehearing, accompanied by assignment of errors and brief. On February 17, 1925, Hardeman's Washington attorneys addressed a communication to the Secretary of the Interior, requesting leave for oral argument in support of his motion (R. 114). The request was granted, oral argument was had on February 27, 1925, the entire case

re-reviewed, and on March 25, 1925, Hardeman's motion for rehearing was denied (R. 114). *51 L. D. 37.* After further correspondence, an order was made on May 6, 1925, closing the case.

On March 9, 1925, Hardeman instituted suit in the Supreme Court of the District of Columbia (R. 26), naming as defendants the Secretary of the Interior, the Commissioner of the General Land Office and the defendant Witbeck. In his bill plaintiff prayed for a restraining order (R. 45) enjoining the enforcing of the Secretary's decision and the issuance of a permit to Witbeck, and for a final judgment perpetuating the restraining order and a mandatory injunction requiring the vacation of the decision complained of (R. 46). This was followed by an amended bill, more fully setting out his cause of action (R. 51). In this bill and amended bill, every complaint made in the present suit is judically advanced. Before service could be made on Witbeck, the Secretary of the Interior and the Commissioner of the General Land Office, on March 18, 1925, moved to dismiss the bill of complaint (R. 50-1), because of its exhibiting no cause of action and because "it clearly appears from the subject matter thereof that the decisions and actions of these defendants were made and taken in the exercise of a function involving their judgment and discretion in a matter committed by the Act of February 25, 1920, exclusively to their jurisdiction." The Supreme Court of the District of Columbia sustained this motion on the ground last mentioned (R. 73), and dismissed the suit; but, instead of prosecuting an appeal from that judgment, the plaintiff ignored it and brought the present suit upon the same cause of action set out in his pleadings in the Supreme Court of the District.

With reference to the contention insisted on throughout

by Hardeman's counsel, that the Secretary's decision finally awarding the permit to Witbeck was unwarranted because of his first decision in favor of Hardeman, we have only to observe that it is settled law that, until the final act of administration is had, the power and duty remains in the Secretary to correct such errors as he or his predecessors may previously have committed.

> "So long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision."
>
> *West vs. Standard Oil Co., 278 U. S. 200, 210.*

> "The decision [of the former Secretary] was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing."
>
> *Wilbur* v. *U. S.* ex rel *Kadrie* et al, 281 U. S. 206.

> "The power of supervision may be exercised by the Secretary whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary."
>
> *Knight vs. United States Land Assn., 142 U. S. 161.*

Besides, the procedure was distinctly authorized by the rules of practice. *Rule* (*48 L. D., 261*), provides:

> "No rule here prescribed shall be construed to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law."

And since Hardeman had a full and complete hearing, both orally and by brief, on his final motion for rehearing (R. 110–114), there is no room left for contention that any rights were arbitrarily denied him.

Nor was there any error committed by the Secretary, if that matter can be gone into.

(a) *Hardeman's application was invalid because not sworn to.*

Section 184 of Title 30 of the United States Code expressly requires that: "All statements, representations, or reports required by the Secretary of the Interior" under the provisions of the law regulating oil and gas permits "shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require."

Hardeman claimed a preference over Witbeck although the latter had filed his application 29 days before him. In order that he might have such preference it is necessary that his application comply with the law.

The opinion of the Circuit Court of Appeals, we submit, properly applied the analogy of an unsworn tax return (*Lucas vs. Pilliod Lbr. Co., 281 U. S. 245*) and an unsworn application for a patent (*Steward vs. American Lava Co., 215 U. S. 161*).

(b) *The Secretary was correct in holding that Hardeman's application without tender of fees conferred no rights.*

Section 2478 of the Revised Statutes (U. S. Code, Title 43, sec. 1201) confers direct authority "to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title [public lands] not otherwise specially provided for."

Section 3 of the Leasing Act authorizes the Secretary "to prescribe fees and commissions to be paid to registers

and receivers of United States land offices on account of business transacted under the provisions of the act."

Section 31 of the regulations, under which the plaintiff's application was made (*47 L. D. 437, et seq.*), provides:

> "Under the authority of Section 38 of the act, the following fees and commissions are prescribed for transactions under the act:
>
> "(a) For receiving and acting on an application for a permit, lease or other right, filed in the district land office in accordance with these regulations, there shall be paid a fee of two dollars for each 160 acres or fraction in such application, but such fee in no case to be less than ten dollars, the same to be paid by the applicant and considered as earned when paid, and to be credited in equal parts on the compensation of the register and receiver within the limitations provided by law."

(See *47 L. D. 461.*)

Circular No. 616, providing for the method of keeping the records and accounts relating to public lands (*45 L. D. 518*), provides (*Section 8*):

> "Where no money is tendered, the application, etc., will be rejected. . . . You will not in such cases, pending the receipt of the money, segregate the land, as the law and regulations are specific in that the money must be tendered with the application, and if it is not transmitted the applicant acquires no rights under the application until the money is tendered."

Hardeman claimed a preference right for thirty days from November 11th. It was necessary, in order that such preference as he had be not lost, that his application in complete form be filed in the district land office within

the thirty days. His incomplete and informal application, accompanied neither by fees nor oath, was filed within thirty days. The regulations, however, prevented the application from having effect and denied the register the right to file it. Witbeck's application was already on file. When the thirty days elapsed without the payment of the fees, the preference right disappeared, the land was not segregated to any application, and it became subject to Witbeck's application for a permit. Such is the basis of the Secretary's decision. Since Hardeman's claim was based entirely upon his contention that he had a preference right, and since, admittedly, the preference right disappeared after December 11th, in the absence of a legal application, when the Secretary's attention was called to the fact that no legal application had ever been filed, he was entirely at liberty, and it was his duty, to hold that Hardeman had no preference right. Hardeman's right to maintain this equitable action rests upon his successful assertion that he did have a preference right. The very basis of his preference right was an application in proper form filed within the statutory period. Such application was never made, and the Secretary, in the proper exercise of his jurisdiction, held that the preference right did not exist.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

SIDNEY L. HEROLD
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Attorneys for Respondent

SUPREME COURT OF THE UNITED STATES.

No. 503.—October Term, 1931.

Jack Hardeman, Petitioner, *vs.* Albert T. Witbeck.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[May 23, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This suit was brought by petitioner in the district court for western Louisiana against respondent to have the former adjudged the beneficial owner of a permit issued May 6, 1925, by the Secretary of the Interior to respondent under § 13 of the Leasing Act,* granting the latter the right to prospect for oil and gas upon 40 acres of land in that State. That court entered a decree for petitioner. The Circuit Court of Appeals reversed. 51 F. (2d) 450.

Section 13 authorizes the Secretary, under such necessary and proper rules and regulations as he may prescribe, to grant to an applicant qualified under the Act a permit to prospect for oil or gas upon land wherein the deposits belong to the United States and are not within a known geological structure of a producing oil or gas field. It provides that, if one shall cause to be erected upon the land for which the permit is sought a monument and shall post a notice in specified form, he shall during the period of 30 days thereafter be entitled to a preference right over others to a permit on the land so identified. A regulation (§ 5 (b), 47 L. D. 441) declares that, if no application is filed within that time, the land will be subject to any other application or to other disposal. Pursuant to authority given him by § 38 the Secretary prescribed a schedule of fees and commissions for transactions under the Act: For receiving and acting on each application for a permit filed in the district land office there shall be charged a fee in no case to be less than $10, to be paid by the applicant and considered as earned

*Act of February 25, 1920, c. 85, 41 Stat. 437, 441.

when paid, and to be credited in equal parts on the compensation of the register and receiver. § 31 (a), p. 461.

On November 12, 1923, respondent complying with the law and regulations, applied for a permit to prospect upon the land and paid the required amount. December 11, petitioner, claiming the preference right given by the Act, filed an application for a permit to prospect upon the same tract. The substance of the application was that on November 11, he had erected the monument and posted a notice on the land as required by the statute. But he did not tender or pay the required fee until December 19. In the contest that followed it was finally held in an opinion promulgated by the Secretary that, petitioner having failed to pay the required amount within the time allowed, respondent was entitled to have the permit. 51 L. D. 36.

Petitioner's application was later than respondent's and he had no ground upon which to claim a permit in the absence of a preference right. In order to secure that right, full compliance with the law and regulations was necessary. The declaration that the fee is for "receiving and acting" on the application and is "to be considered as earned when paid" strongly confirms the inference, which would exist without it, that payment is essential to the completion of the application. When the thirty days expired, petitioner's preference right was at an end, and the land was subject to respondent's application for a permit.

As the Secretary rightly held petitioner not entitled to the permit, he has no standing to maintain this suit. *Fisher* v. *Rule,* 248 U. S. 314, 318. *Anicker* v. *Gunsburg,* 246 U. S. 110, 117.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.